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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 183

TOM G. SANDERS,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

CHARLES E. DIERKER,
Counsel for Petitioner.

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TOM G. SANDERS, AN INDIVIDUAL,

Petitioner,

vs.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Tom G. Sanders, by his attorney, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered May 7, 1952 (R. 73), reversing the judgment of the District Court of the United States for the Western District of Oklahoma entered August 17, 1951 (R. 66).

Jurisdiction

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938, and the Act of June 25, 1948, c. 646 62 Stat. 928.

Opinions Below

The Findings of Fact and Conclusions of Law of the District Court are printed at pages 64 to 66 of the Record.

The opinion of the Court of Appeals, reversing the judgment of the District Court, entered August 17, 1951 (R. 66), was handed down May 7, 1952 and is printed at pages 69 to 73 of the Record and reported in — Fed. (2) —.

Statutes and Regulations Involved

The pertinent statutes and rules are printed in the Appendix, infra.

Question Presented

Is sale and delivery of a product by a resident of a state at his home or place of business a transaction in interstate commerce where the purchaser resides out of the state and makes such purchase for the purpose of taking such product out of the state for his own use and consumption in the state of his residence, the purchaser accepting delivery of such product at the home or place of business of the seller and the seller taking no part in the transportation?

Statement of the Case

Tom G. Sanders, a citizen of the United States, residing near Pearson, Pottawatomie County, Oklahoma, has for many years been engaged in the preparation and sale of a home remedy that is supposed to have certain curative values for certain bodily ailments (R. 8 and R. 17).

The instant proceeding was instituted seeking permanently to enjoin Sanders from introducing or causing to be introduced, delivering or causing to be delivered for introduction into interstate commerce the said drug or article on the ground that same was misbranded within the meaning of certain statutory provisions. Sanders consented to the issu-

ance of an injunction along the broad lines above indicated and thereafter, upon advice of counsel, took no part in what his counsel advised and instructed him would in counsel's opinion constitute interstate commerce (R. 8 and R. 17).

Thereafter an application for order to show cause was filed in said matter (R. 5), alleging that on six occasions in Oklahoma Sanders sold and delivered said misbranded drug to persons who resided outside the state with knowledge that said parties would take same with them when they returned to their respective places of residence.

To this application for rule to show cause Sanders filed a statement of facts in the nature of a response (R. 17), in which he admitted that he had sold the article to persons who resided outside the State of Oklahoma, but denied that he knew they would take it with them outside the state and denied further that he knew what they would do with it on leaving his premises. On this state of the record and on the facts as above set out, the District Court found that the activities of Sanders did not constitute interstate commerce and, therefore, denied the application for a citation for contempt. (R. 57 to 64 inc.)

Specifications of Errors to Be Urged

1. The court below erred in applying an erroneous legal test in reaching the conclusion that Sanders' activities constituted interstate commerce.

2. The court below erred in failing to adopt and follow the legal test for determining whether the activities of Sanders constituted interstate commerce so as to make applicable the provisions of the Federal Food, Drug, and Cosmetic Act with reference to misbranding (Section 301(a) of the Act (21 U.S.C. 331(a)) and Section 502(b)(1), (b)(2), (e)(2) or (f)(1) of the Act. (352(b)(1), (b)(2), (e)(2), (f)(1)).

3. The court below erred in reversing the judgment of the trial court to the effect that the activities of Sanders did not constitute interstate commerce and that, therefore, the Pure Food and Drug Administration was without any jurisdiction or power to control his activities.

Reasons for Granting Writ

The decision of the Court of Appeals is in direct conflict with two decisions of this Court: The first, *Superior Oil Company* v. *State of Mississippi*, 280 U. S. 390; and the second, *Eastern Air Transport, Inc.* v. *Tax Commissioner*, 285 U.S. 147, neither of which is referred to in the opinion below, though the second was referred to in our brief and the first in our petition for rehearing.

Said decision is also in direct conflict with an administrative interpretation as to what constitutes interstate commerce issued by the Pure Food and Drug Administration itself as reported in Toulmin—The Law of Food, Drugs and Cosmetics, page 28, 1942 Edition, referred to in our brief which follows.

Conclusion

Certiorari should be granted.

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BRIEF IN SUPPORT OF PETITION

The Decision of the Court of Appeals Is in Conflict with Two Decisions from this Court, which Are As Follows:

In the case of *Superior Oil Company* v. *State of Mississippi*, 280 U. S. 390, this Court in the first paragraph of the syllabus said:

> "1. A sale of gasolene is not converted into an interstate transaction, so as to render inapplicable a state gasolene sales tax, by the fact that the gasolene is transported on boats operated by the purchaser into another state, for resale there, under a so-called bill of lading naming the purchaser as consignee and reciting that the gasolene shall remain the property of the seller until delivered to consignee, or consignee's agent, at point of destination, since it is optional with the purchaser whether to carry out of the state or not."

In the above case, the Superior Oil Company, a Mississippi corporation, sold gasoline to packers in Biloxi, Mississippi, and delivered the same to the packers' wharves at Biloxi, Mississippi. The packers loaded the gasoline into their own boats, taking it to Grants Pass, Louisiana, there it was delivered to shrimp fishermen for their use in fishing. The shrimp fishermen brought their catch back to Biloxi, Mississippi, selling it to the packers who then deducted the charge for the gasoline in settling accounts. This statement of the facts is taken from Justice Holmes' opinion. However, we would respectfully urge a reference to the opinion of Justice Anderson of the Mississippi Supreme Court, reported in 119 So. 360, which goes into full details, and we take the liberty of quoting from said opinion of Justice Anderson in the body of the opinion in the third from the last paragraph, as follows:

> "* * * The gasoline involved in this case, immediately after its purchase by the packers, moved

> in interstate commerce; it was purchased with that intention. Both the seller and the purchaser knew that the gasoline was going to move across the state line into Louisiana. But, what did that have to do with the contracts of sale and the purchase? If the appellee, under the contract, had any real substantial part in the transportation of the gasoline into Louisiana, that would make them interstate commerce transactions. But, the evidence shows, beyond any doubt, that appellee had no part in the transportation. It simply delivered the gasoline to the packers in this state, who took charge of it and transported it into another state. * * *"

And later in the same paragraph where Justice Anderson says:

> "* * * The contracts of purchase and sale were complete when the gasoline was delivered on the wharves in this state. * * *"

We respectfully submit,, therefore, that if gasoline purchased for consumption in another state and which was taken charge of by the purchaser in the state of purchase and transported by him for commercial use in another state does not make such a sale an interstate transaction, certainly where the facts are such as in the case at bar, where the purchaser purchases the product for his own use in another state, commerce does not arise at all and, if commerce does not arise, then interstate commerce is impossible.

The next case from this Court is *Eastern Air Transport, Inc.* v. *Tax Commissioner*, 285 U. S. 147, opinion by Mr. Chief Justice Hughes. In the above case the facts were that the State of South Carolina had imposed a tax on the sale of aircraft fuel purchased by an air transport company for use in its planes, which were engaged in interstate commerce. The airline company contended that this tax constituted a

burden on interstate commerce, and in upholding the tax, this Court, speaking through Mr. Chief Justice Hughes, says:

> "• • • The mere purchase of supplies or equipment for use in conducting a business which constitutes interstate commerce is not so identified with that commerce as to make the sale immune from a non-discriminatory tax imposed by the state *upon intrastate dealers*" (Emphasis added).

And in another place in the opinion this Court says:

> "Treating the tax as an excise tax upon the sales does not change the result in the instant case, *as the sales are still purely intrastate transactions.*" (Emphasis added).

In both of these statements, the court clearly implies that, even though the fuel is to be used in interstate commerce, the transaction between the vendor of the fuel and the operator of the airline company is wholly of an *intrastate* character. What the purchaser of the fuel chose to do with the commodity after its purchase was of no concern to the vendor.

We agree with the last paragraph of Judge Huxman's opinion in the Court of Appeals when he says:

> "To be guilty of violating the Act, it was not necessary that appellee be engaged in interstate commerce with respect to a misbranded drug. It was sufficient if he was engaged in delivering such a drug for introduction into *interstate commerce*. If appellee knowingly and regularly sold misbranded drugs and delivered them knowing that they were purchased for transportation in *interstate commerce*, and solicited customers to return for future purchases and deliveries, he was guilty of a violation of the Act. The allegations of the complaint for a show cause order alleged that he did all of this and for the purpose of the motion they stand

admitted as true. We accordingly conclude that stated an offense and that the trial court erred in dismissing the application for a show cause order." (Emphasis added.)

Let us pick out a phrase from the context:

"It was sufficient if he was engaged in delivering such a drug for introduction into *interstate commerce*." (Emphasis added.)

If there was any allegation or any facts alleged or conjectured from which it could be deduced that appellee delivered this product for introduction into *interstate commerce*, we would not be seeking review in this Court.

May we impose just a moment longer to illustrate our point:

A. living at Garden City, Kansas, goes to Pottawatomie County, Oklahoma, purchases this article, pays for it and takes it home with him, traveling by automobile or common carrier, he then consumes it himself. How, we earnestly ask, can this be held to constitute interstate commerce? Surely, to be interstate commerce you must first have and find the facts to constitute *commerce*, and how in the world can one carry on commerce with one's self? Where, we are quite sure, Judge Huxman misses the point, is that he confuses the facts in such a situation with a state of facts about like this. A. at Garden City, Kansas, gives B. ten dollars and tells him to go to Pottawatomie County, Oklahoma, and purchase for him a jar of this product. B. does that; gets the product and returns to Garden City with it and turns it over to A. Now, you have commerce, trade, barter, sale, exchange. So let us repeat, one cannot create commerce with one's self.

The decision of the Court of Appeals is in conflict with an administrative interpretation as to what constitutes inter-

state commerce issued by the Pure Food and Drug Administration itself as reported in Toulmin—The Law of Food, Drugs and Cosmetics, page 28, 1942 Edition:

> " 'With reference to medicines given to your patients at your hospital and transported by them to their homes in some other States for use by themselves, it is our opinion that such a transaction is not interstate commerce as that term is defined in Section 201(b) of the Act. * * *' "

Counsel for petitioner certifies that in his opinion this petition is well founded and is not interposed for delay.

It is respectfully submitted that this petition should be granted.

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Counsel for Petitioner.

APPENDIX

Section 331, 21 U. S. Code Annotated:

The following acts and the causing thereof are hereby prohibited:

(a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded.

(b) The adulteration or misbranding of any food, drug, device, or cosmetic in interstate commerce.

(c) The receipt in interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded, and the delivery or proffered delivery thereof for pay or otherwise.

(d) The introduction or delivery for introduction into interstate commerce of any article in violation of section 344 or 355.

Section 352, 21 U. S. Code Annotated:

A drug or device shall be deemed to be misbranded—

(a) If its labeling is false or misleading in any particular.

(b) If in package form unless it bears a label containing (1) the name and place of business of the manufacturer, packer, or distributor; and (2) an accurate statement of the quantity of the contents in terms of weight, measure, or numerical count: *Provided*, That under clause (2) of this paragraph reasonable variations shall be permitted, and exemptions as to small packages shall be established, by regulations prescribed by the Administrator.

* * * *

(e) If it is a drug and is not designated solely by a name recognized in an official compendium unless its label bears (1) the common or usual name of the drug, if such there be; and (2), in case it is fabricated from two or more ingredients, the common or usual name of each active ingredient, including the quantity, kind, and

proportion of any alcohol, and also including, whether active or not, the name and quantity or proportion of any bromides, ether, chloroform, acetanilid, acetphenetidin, amidopyrine, antipyrine, atropine, hyoscine, hyoscyamine, arsenic, digitalis, digitalis glucosides, mercury, ouabain, strophanthin, strychnine, thyroid, or any derivative or preparation of any such substances, contained therein: *Provided*, That to the extent that compliance with the requirements of clause (2) of this paragraph is impracticable, exemptions shall be established by regulations promulgated by the Administrator.

(f) Unless its labeling bears (1) adequate directions for use; and (2) such adequate warnings against use in those pathological conditions or by children where its use may be dangerous to health, or against unsafe dosage or methods or duration of administration or application, in such manner and form, as are necessary for the protection of users: *Provided*, That where any requirement of clause (1) of this paragraph, as applied to any drug or device, is not necessary for the protection of the public health, the Administrator shall promulgate regulations exempting such drug or device from such requirement.

Also

Rule 42(b), Federal Rules of Criminal Procedure Title 18, Section 3731 U. S. Code Annotated.